Answer by E. C. Bam: It is unusual for a boy to be engaged as a servant at his mother's people's kraal.

Question: Is the grandfather's heir entitled to keep a goat given under such circumstances until "sondlo" is paid?

Answer by J. Ngcwabe: "Sondlo" is only payable if the boy leaves before he renders service. Not if he leaves as a grown man.

Question: If he goes as a small boy and "sondlo" is payable and the grandfather dies can the heir hold any gifts made to the small boy until "sondlo" is paid?

Answer by E. C. Bam: They cannot do that. The child can leave with his stock and the kraalhead then has a claim against the child's father for "sondlo". If the child has stock with his mother's people he can pay the sondlo out of that if he wishes, but it cannot be impounded for the purpose.

Question by Mr. Hughes: If the maternal grandfather gives the boy goats and then dies and the kraal is taken over by the grandfather's heir, should the boy say he wants to go home with his stock, can the heir refuse to release him until he pays "sondlo"?

Answer by—

Mtirara: No. He must go to the father of the boy.

J. Ngcwabe: He cannot impound the stock.

Question: What is the position when a girl lives with her mother's people?

Answer by E. C. Bam: If a girl lives at a kraal no "sondlo" is payable.

Question: When is "sondlo" payable?

Answer by E. C. Bam: According to Xhosa Custom any child taken to its mother's people for keeping should be released by payment of "sondlo" irrespective of sex except when it is borrowed by the mother's people for nursing or herding or something of that nature no "sondlo" is then payable. Sometimes a boy who is borrowed for herding is given a gift, but not as a reward for his services.

Question: Would such a gift be confined to small stock or could it include large stock?

Answer by E. C. Bam: It depends on what they want to give; there is no restriction.

Question: What is meant by the colour "mpemvukazi"?

Answer by—

E. C. Bam: Among the Pondomises it is a black animal with a white face.

Mtirara: Among the Tembus it is a red or black beast with small white spots on the face.

Bazindlovu: These terms are not customary. Individuals differ in their use of these descriptions.

Question: What colour is "rwanqa"?

Answer by E. C. Bam: This is a red or black beast with a white belly.

All agree.

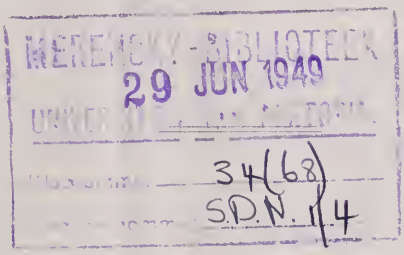
Question: What is a "ngqilakazi" beast?

Answer by E. C. Bam: This has a red body with a white throat but these terms are not consistently applied.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT



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CASE No. 35.

EDWARD SIMANGA *v.* FALENI NKAMPULE.

KINGWILLIAMSTOWN: 17th November, 1948. Before Pike (Acting President), van Heerden and Warner, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Interpleader Action—Possession of movable raises presumption of ownership—Stock card not prima facie *proof of ownership—Term registered owner means person who must comply with the statutory dipping requirements—Onus—Claimant must prove beyond reasonable doubt that the cattle attached are his.*

Appeal from the Court of the Native Commissioner, Lady Frere.

Pike (Acting President) delivering the judgment of the Court:

This is an interpleader action. The Assistant Native Commissioner declared the three cattle not executable and the appeal is on the ground that the judgment is against the weight of evidence.

It is not disputed that the cattle were attached whilst they were in the stock kraal of the judgment debtor, Yedwa Mkampule, who is the elder brother of claimant. The cattle were therefore in the possession of the judgment debtor. Possession of a movable raises a presumption of ownership and therefore a person claiming the ownership in an interpleader suit must rebut the presumption by clear and satisfactory evidence (Zandberg *v.* van Zyl, 1910 A.D. 302).

The claimant states that these cattle were paid to him as dowry for his eldest daughter. The only witness called to support that statement has no actual knowledge of the payment of the dowry. He only knows what his brother (claimant) told him. He concludes his evidence by saying "All I know of my personal knowledge is that Yedwa owns no stock and that claimant does own stock". His evidence is therefore of little, if any, value.

The claimant states that the cattle attached are registered in his name for dipping purposes. He produced a stock card showing that at the time of attachment ten head of cattle were registered in his name. The Assistant Native Commissioner regarded this as establishing a *prima facie* case in his favour. In this Court counsel for respondent correctly conceded that this does not constitute *prima facie* proof of ownership. The necessity for registering cattle is prescribed by regulations under G.N. No. 1782 dated 12th December, 1941. These regulations are made under authority of the Stock Diseases Act, No. 14 of 1911, wherein the term owner is defined as—

(*a*) every person who is the sole or part owner;

(*b*) if the sole or part owner has not for the time being the control of the stock the person who has such control.

The term registered owner means the person who must comply with statutory requirements concerning dipping and other measures to combat cattle diseases. It is possible for two or more men to have their stock registered in only one of their names for the sake of convenience or for other reasons. The regulations require the owner to maintain a register which is in the form of the stock card produced. The production of that card means no more than that the person whose name appears thereon has declared himself to be the owner or person having control of the number of cattle appearing thereon.

It might well be that when claimant registered ten cattle in his name that three of these were the property of the judgment debtor who for some reason at that time (i.e. of registration) did not have control of them. The claimant admits that the judgment debtor owned two cattle which were paid to the judgment creditor previously and three cattle which he paid as damages on behalf of his son Wawi, all five of these cattle having been at that time registered on his (claimant's) stock card.

The only evidence that the cattle attached belonged to claimant is his own. The judgment creditor has denied that these cattle were paid to claimant as dowry stating that he actually drove the dowry in question. He positively affirms that the cattle are the property of the judgment debtor and gives his reasons for saying so. There must have been other evidence available to the claimant which he should have called. It is significant that the judgment debtor, who was present at Court, was not called to say that the cattle attached were not his and to identify them as forming portion of the ten cattle registered in claimant's stock card.

The onus that was upon claimant is a heavy one. He must prove beyond reasonable doubt that the cattle attached are his and this he has signally failed to do.

The appeal is allowed with costs and the cattle attached are declared executable with costs.

For Appellant: Mr. Kelly.

For Respondent: Mr. Barnes.

CASE No. 36.

JAMES KEKE v. JACK SOMNONO.

KINGWILLIAMSTOWN: 18th November, 1948. Before Pike (Acting President) Warner and Fenix, Members of the Court (Southern Division).

Native Appeal Case—Defamation—Practice and Procedure—Onus—A judgment dismissing summons is equivalent to absolution—Words uttered and published are defamatory per se—Animus injuriandi *is presumed from the fact that the defamatory words were published—Plaintiff entitled to general damages—Onus on defendant to establish pleas.*

Appeal from the Court of the Native Commissioner, Kingwilliamstown.

Pike (Acting President) delivering the judgment of the Court:

Plaintiff claimed the sum of £50 as damages for slander. Defendant admitted uttering the words stated in plaintiff's summons and publication of these words. He pleaded justification, alternatively rixa, and as a final alternative that plaintiff had suffered no damages as the words uttered did not injure plaintiff's name, fame or reputation as plaintiff's character is such that the words are incapable of defaming his character.

Plaintiff's attorney submitted that the onus was on defendant but the Native Commissioner ruled that the onus was on plaintiff. The record reads:—

> "The Court after having given its reasons for ruling that plaintiff has to proceed with the case asks Mr. Randell (plaintiff's Attorney) whether he wishes to proceed with the action or close his case. Mr. Randell intimated that he was not prepared to close his case nor was he prepared to lead evidence at this stage. In the circumstances the summons is dismissed with costs."

The plaintiff has appealed on the following grounds:—

(*a*) That the judgment given is not a competent one in that it is not in compliance with section 28 of the Rules for Native Commissioners' Courts.

(*b*) That the judgment is bad in law in that the Native Commissioner was wrong in holding that the onus was on the plaintiff to prove his case when the uttering and publication of words "per se" defamatory were admitted by defendant and special pleas set out.

Rule 28 provides that the Court may in any action—

(*a*) give judgment for the plaintiff; or

(*b*) give judgment for the defendant; or

(*c*) give absolution from the instance if it appears to the court that the evidence does not justify the court in giving judgment for either party, and

(*d*) make such order as to costs as may be just.

Rule 26 makes provision for a summons to be dismissed if plaintiff is in default and that judgment would be given if an exception to the summons is upheld. Neither of these factors is applicable in this case and therefore the judgment should have been absolution from the instance. A judgment dismissing the summons is equivalent to absolution [*vide* Millicent Ndudane *v.* Nicholas Maqwati, 1937 N.A.C. (C. & O.) 200]. There has thus been no prejudice to appellant and this Court is bound by the proviso in section 15 of Act No. 38 of 1927. The first ground of appeal therefore fails.

In regard to the second ground of appeal the words uttered and published by defendant are defamatory *per se*. The existence of *animus injuriandi* is presumed from the mere fact that the defamatory words were published of the plaintiff, and the plaintiff establishes a *prima facie* case when he shows that the defendant was responsible for their publication. This presumption the defendant can only rebut "by proving that his case falls within certain definite and recognised categories of privilege, exemption or excuse, and if he does not prove that, it will not avail him to show that in fact he had no intention to injure the plaintiff" (*vide Law of Delicts*, 3rd Edition, by McKerron at page 198).

In the case of Walton *v.* Cohn, 1947 (2) S.A.L.R. 225, *de Wet, J.*, stated "On the assumption that plaintiff confined his claim for damages to general damages the Magistrate was right in ruling that the onus was on defendant to begin. It would appear to be quite clear from the authorities that the plaintiff is entitled to general damages when the words complained of are defamatory *per se*. There can be no doubt about it that the words used by defendant in this case were defamatory *per se* and the words spoken, having been admitted by defendant, the plaintiff was entitled to general damages without leading any evidence".

The Native Commissioner therefore erred in dismissing plaintiff's claim because he would not lead any evidence.

The appeal is allowed with costs, the judgment is set aside and the case remitted to the Court below to be tried out.

For Appellant: Mr. Randell.

For Respondent: Mr. Stanford.

CASE No. 37.

MINATI KOMANI *v.* **MBAMBISO TYESI.**

KINGWILLIAMSTOWN: 18th November, 1948. Before Pike (Acting President), van Heerden and Warner, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction—Practice and Procedure—A case of seduction must be decided upon the balance of probabilities—When absolution may be granted at close of plaintiff's case—Woman's evidence requires corroboration—Such corroboration only necessary if defendant denies seduction on oath—Defendant's admission of seduction on previous occasions is corroboration of girl's story.

Appeal from the Court of the Native Commissioner, East London.

Pike (Acting President) delivering the judgment of the Court:

This is an action for five head of cattle or their value £25 as damages for the seduction and pregnancy of plaintiff's sister, Nodabana. At the close of plaintiff's case application was made for an absolution judgment and this was granted on the ground that there was no corroboration of the girl's testimony. The appeal is based on three grounds:—

1. That the Assistant Native Commissioner erred in holding that there was no corroboration of the evidence of Nodabane Komani.
2. That the Assistant Native Commissioner erred in holding that the plaintiff had failed to prove a *prima facie* case.
3. That the Assistant Native Commissioner erred in granting a judgment of absolution from the instance at the conclusion of the plaintiff's case.

Plaintiff gave evidence that he was the brother and guardian of the girl Nodabana—that when her pregnancy was discovered he personally interviewed defendant who admitted to him that he was in love with the girl and that he had rendered her pregnant. He goes on to say that at a later date he and defendant appeared before the Native Commissioner of East London when defendant again admitted being responsible for the pregnancy and was advised by the Native Commissioner to pay plaintiff five head of cattle. Nodabana testified that she had been defendant's "girl" for the past five years—that two years ago he seduced her and thereafter continued to have intercourse with her, as a result of which she became pregnant and gave birth to a child. She denies she has ever had intercourse with any other man.

On that evidence defendant's attorney applied for absolution and the Assistant Native Commissioner granted the application without hearing any evidence by defendant.

When such an application is made, the test to be applied is set out very clearly by *de Villiers, J.P.*, in Gascoyne *v.* Paul & Hunter, 1917 T.P.D. "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the Court would then be, 'Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?)'."

In Blesse *v.* Brock, 1948 (2) S.A.L.R. 756, *Carlisle, J.*, in his judgment states "This Court pointed out in Jagadamba *v.* Boya [1947 (2) S.A.L.R. 283] that a seduction case is a civil case and as such must be decided upon the balance of probabilities, but the special rule that the evidence of plaintiff requires corroboration applies. The process of balancing the probabilities takes place after all the evidence has been led. It is this last rule that the Magistrate has lost sight of. His view was that the mere denial in his pleadings of a seduction or of a contract of marriage was sufficient but this is not so. There was a case upon the plaintiff's evidence which the defendant had to meet and the Magistrate ought not to have granted an absolution. In that case *de Wet, J.*, stated "In so far as the claim for seduction is concerned it is a well-established rule that a woman's statement that a man has seduced her requires corroboration but in my view such corroboration is only necessary if the defendant has denied her statement on oath. . . . A denial in a plea has no sanction and therefore does not correspond to a denial on oath."

In Jacob Mvula *v.* Makosi Majikijela [1946 N.A.C. (C. & O.) 3] the Court stated "In the present case there is the uncontradicted evidence of Zebia that defendant seduced her and is the father of her child. This evidence has not been denied by defendant under oath and no corroboration of her evidence was therefore necessary."

With that statement this Court is in full agreement and must with respect disagree with the majority judgment in the case of Maqutsana Mafasa *v.* Ngcazambula Gxotelwa [1948 N.A.C (C. & O.) 9]. The legal position as stated in that judgment applies only when defendant has denied *on oath* the allegations of seduction or adultery, which was not done in that case.

It is clear therefore that, defendant not having given evidence, the Assistant Native Commissioner erred in granting absolution because Nodabana's evidence was not corroborated. In fact he also erred in holding that there was no corroboration. The plaintiff states that defendant admitted to him that he was the cause of her pregnancy and that he again admitted that fact before the Native Commissioner. It is difficult to imagine stronger corroboration than an admission of such a nature by defendant.

In this Court counsel for respondent contended that the judgment was correct on the ground that the summons alleged that seduction took place during or about December, 1946, whereas the girl's evidence indicated that she was seduced in or about June, 1946. It is true she does say that the first act of intercourse was in June and that intercourse continued thereafter. She gave birth to a child about August, 1947. It must, however, be borne in mind that plaintiff does not rely

only on her evidence. There is his own unrebutted testimony that defendant on two occasions made a clear admission of liability. These admissions were alleged in the summons. There was thus a substantial case for defendant to meet. [*Vide* Michelson *v.* Taylor, P.H. 1929 J. 2 and Isaac Mafileka *v.* Sikwintshi Lubobo and Royi Lubobo, 1945 N.A.C. (C. & O.) 28.]

The appeal is allowed with costs, the judgment is set aside and the case remitted to the Court below to be tried out.

For Appellant: Mr. Stanford.

For Respondent: Mr. Randell.

CASE No. 38.

JOHN MJONGILE *v.* **HOWARD TSABI.**

KINGWILLIAMSTOWN: 18th November, 1948. Before Pike (Acting President), van Heerden and Warner, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Ejectment Order—Section 25 of Rules prescribes form of summons as set out in First Annexure—Summons conveys to defendant case he has to meet—Acceptance of rent conditionally does not condone late payment or renew lease—Magistrate could not dismiss summons on exception which was not taken by defendant.

Appeal from the Court of the Native Commissioner, Queenstown.

Pike (Acting President) delivering the judgment of the Court:

In this action the plaintiff issued summons against defendant in the following form:—

"You are hereby required to appear before the Court at Queenstown, on Thursday, the 13th day of May, 1948, at the hour of 9.30 in the forenoon, together with your witnesses, if you have any, to answer the claim of JOHN MJONGILE, employed by the Queenstown Municipality and residing at Site B.J.8, Location, Queenstown (hereinafter styled the plaintiff).

As follows:—

(1) The parties to the suit are aboriginal natives of South Africa.

(2) The defendant hired from the plaintiff certain premises at Site No. 59 in the Queenstown Municipal Location, at a rental of 10s. per month, payable in advance.

(3) On the 2nd February, 1948, the plaintiff gave notice to the defendant terminating the lease of the premises under common law on the 29th February, 1948.

(4) The rent due by defendant has been paid irregularly, and the rent for the month of April, 1948, which fell due on the 1st April, 1948, has not yet been paid.

Wherefore the plaintiff prays that the defendant be ordered to remove from the premises occupied by him at Site 59, Queenstown Location, and that he be ordered to pay the sum of 10s., being rent for April, 1948, together with costs of suit."

To this summons defendant pleaded:—

"Plea that amount was paid on 27/4/48 and it was accepted without prejudice. Hands in receipt 'A'. That late payment was condoned."

The summons was issued on 22nd April, 1948, and served on the 27th April, 1948. The action was tried on the 20th May, 1948. The plaintiff's attorney gave evidence at the conclusion of which defendant's attorney asked for the dismissal of the summons "as summons stated rent not paid whereas rent had been paid when

summons served". The Native Commissioner granted the application and dismissed the summons with costs. At the request of the plaintiff's attorney the Native Commissioner furnished the following written judgment:—

"(1) The plaintiff sued the defendant for 10s. rent for April, 1948.

(2) The rent was paid on 27th April, 1948, on the day the summons was served on him but before the summons was served. *Vide* plaintiff's attorney's evidence.

(3) There was no claim for ejectment.

(4) There was a prayer for ejectment, but there can be no prayer for what is not claimed.

(5) In view of the above the summons was dismissed with costs."

The plaintiff then noted an appeal on the following grounds:—

"(*a*) That the ground upon which the summons was dismissed as announced at the time of judgment and repeated in the reasons for judgment was that the summons did not contain any claim, which was in the nature of an exception, which exception was at no time raised by the defendant.

(*b*) That the decision of the Native Commissioner that the summons contained no claim for ejectment is erroneous as the summons plainly contains such a claim.

(*c*) That at the time of the issue of the summons plaintiff was entitled to an order for ejectment and to the payment of the sum of 10s. and costs of suit and the payment by defendant of the amount of 10s. admittedly due, did not prejudice plaintiff's claim either for ejectment or for costs already incurred or which later became necessary in order to obtain judgment for the unsatisfied portion of the claim.

(*d*) That the Native Commissioner refused to admit or to record any evidence of events taking place and of correspondence between the parties prior to the issue of summons."

The evidence of plaintiff's attorney was as follows:—

"On 22/4/48 I issued summons against defendant and on 27/4/48 defendant appeared in my office and offered to pay £1 in respect of this claim. Defendant said he had not received the summons, and Messenger confirmed this. I informed defendant that summons for ejectment had been issued against him, and ejectment would be proceeded with. I told him rent for April, 1948, I would give him receipt but as far as rent for May was concerned this depended entirely upon whatever order is made by the Court on claim for ejectment. Summons was served after my interview. On 30/4/48 I wrote to defendant 'A'. *xxd. Mr. de Kock.* On 1/4/48 I gave no notice that he should pay rent by 7/4/48."

Two receipts were issued to defendant, No. 3627 being for 10s. "rent John Mjongile (presumably April rent)" and No. 3628 also for 10s. "being rent John Mjongile for May, 1948, subject to the Court allowing defendant to remain to end of May". This receipt was sent to defendant under cover of a letter dated 30th April, which was put in at the trial, reading:—

"With reference to payment of 10s. made by you I hand you receipt showing that the amount has been accepted conditionally, subject to whatever order may be made by the Native Commissioner. You will note that the application will be heard on the 13th May, at 9.30 a.m."

It is difficult to know what the Native Commissioner meant when he says "There was no claim for ejectment", if he is correct then there was no claim for arrear rent (*vide* final paragraph of the summons).

Section 25 of the Rules for Native Commissioners' Courts prescribes that the summons commencing an action shall be substantially in the form set out in the First Annexure thereto. The form set out therein has the following note: "Set out clearly and concisely the nature of the claim so that the defendant will know what case he has to meet." The present summons is substantially in the form prescribed by the Rules and clearly conveys to defendant the case he has to meet. This is borne out by the fact that defendant did not file any exception. In Scheepers

v. Krog (1925 C.P.D. page 9), *Watermeyer, J.*, states "It is quite clear and indeed it was not contested that the Magistrate could not dismiss the summons on an exception which was not taken by the defendant."

It is, however, necessary to consider the further point as to whether the acceptance of the rent by plaintiff, through his attorney, constituted a fresh lease.

The evidence for plaintiff stands uncontradicted. The acceptance of the rent was subject to the Court allowing defendant to remain to the end of May or as expressed in the letter to defendant, subject to whatever order may be made by the Native Commissioner. The plaintiff's attorney in evidence confirmed that that condition was made clear to defendant at the time the rent was accepted. The plaintiff's attorney was then aware of the fact that the summons had not yet been served. Had condonation been intended he would surely have withdrawn the summons.

In van der Merwe *v.* Erasmus [P.H. 1945 (1) A.12] it was held that the facts relied upon to prove a tacit agreement must be such as to admit of no doubt as to the owner's willingness to grant or continue the tenancy.

In this case the facts *prima facie* fail to prove a tacit agreement but establish that plaintiff's attorney had no intention of condoning the late payment of the April rent or renewing the lease, when he accepted payment for the May rent.

The Native Commissioner therefore erred in dismissing the summons and the appeal is allowed with costs. The judgment is set aside and the case remitted to the Court below to be tried out.

For Appellant: Mr. Stanford.

For Respondent: In default.